



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL APPEAL 207 OF 2014**

**MICHAEL MBITHI MUKANDA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal arising out of the sentence of G.M. Mutiso, Ag. PM in Criminal [Case](#) No. 1620 of 2014 delivered on 23<sup>rd</sup> September 2014 in the Principal Magistrate's Court at Makindu)**

**JUDGMENT**

The Appellant was arraigned in the trial Court on 23<sup>rd</sup> September 2014 and pleaded guilty to the offence of obtaining by false pretences, contrary to section 313 of the Penal Code. The particulars of the offence were that on 22<sup>nd</sup> May 2013 at Kambu Market in Kibwezi sub-county within Makueni County, with intent to defraud, he obtained from Fransisca Mwikali Musyoki two black bulls valued at a total of of Kshs 64,000/=, by falsely pretending to pay the said sum of Kshs 64,000/= as the cost of the two bulls.

When the facts were read out to the Appellant, he admitted that they were true. The Appellant operated a butchery and promised to pay the money after slaughtering the bulls, but never did so. He stated that he did not pay the complainant because the money got finished after he sold the meat.

The learned trial magistrate, while noting the need for a deterrent sentence to prevent such economic crimes, sentenced the Appellant to serve three years' imprisonment. The Appellant being aggrieved appealed the conviction and sentence meted by the trial magistrate. During the hearing of the appeal, the learned counsel for the Appellant, Mr. Kimeu, submitted that the Appellant had abandoned the appeal against conviction and was only appealing against the sentence.

The Appellant's grounds of appeal are stated in his Amended Grounds of Appeal filed in Court on 29<sup>th</sup> April 2015. These are that the sentence imposed on him was the maximum and was harsh and excessive, and he sought a reduction of the same. He also sought a consideration of his mitigation and the time he served in remand pursuant to section 333(2) of the Criminal Procedure Code, and that the remaining part of his sentence after reduction to be served under a community service order. The Appellant also stated that he was sick and under constant medication.

The learned counsel for the Appellant submitted that the sentence meted on the Appellant of 3 years imprisonment was harsh and excessive given that under section 313 of the Penal Code the maximum sentence is 3 years, and the offence was a misdemeanour. Further, that the value of the black bulls was Kshs 64,000/=, the Appellant was a first offender and he had saved judicial time by pleading guilty. The counsel also relied on a medical report on the Appellant filed in Court on 18<sup>th</sup> February 2015 prepared by the Senior Medical Officer at Makueni County Referral Hospital.

The learned counsel further urged the Court to review the Appellant's sentence and order a non-custodial sentence, and submitted that the Appellant was willing to repay the complainant if his sentence is reviewed.

Ms. Abuga, the learned counsel for the State conceded that the Appellant was a first offender and had saved the Court's time by pleading guilty, and that the trial Court having considered these factors ought not to have imposed the maximum sentence .

I have considered the arguments made by the Appellant and the State, and find that the issue for determination by the court is whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive as provided for under Penal Code or in any other statute, and whether the sentence is amenable to reduction. The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor vs R, (1954) EACA 270** wherein the Court of Appeal stated as follows:

***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."***

In the case of **Shadrack Kipkoech Kogo –v- R, Eldoret Criminal Appeal No.253 of 2003**, the Court of Appeal stated thus:-

***"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"***

In the instant appeal, it is not in dispute that the Appellant was charged with the offence of obtaining by false pretences contrary to section 313 of the Penal Code which provides as follows:

***"Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanor and is liable to imprisonment for three years."***

It is noted from the said provisions that the offence the Appellant was convicted of attracts a maximum sentence of imprisonment of three years. Sentencing is in the discretion of the court, and in the present appeal there were mitigating factors that merited to be considered, particularly the fact that the Appellant did plead guilty to the offence and was a first offender. To this extent the Appellant's appeal is allowed and his sentence is reduced to one year's imprisonment to take effect from the date of his sentencing by the trial court.

This Court is in addition empowered to order that a term of imprisonment of less than 3 years be served by way of community service under section 3(1) of the Community Service Orders Act (Chapter 93 of the Laws of Kenya). After the hearing of the appeal, this Court accordingly ordered that a community service orders report on the Appellant be prepared, and the said community service orders report was filed in Court on 29<sup>th</sup> July 2015.

The said report indicates that the Appellant is 40 years old and a first offender, and that he was remorseful. Further, that his family had agreed to help him compensate the complainant and pay her the money she is owed by the Appellant. The Appellant's home report was also positive and his family and the local administration described him as hardworking and that his business had run into losses because of the hard economic times, and that is the main reason he was not able to pay his suppliers. The Appellant was found to be suitable for a non-custodial sentence and it was recommended that he serves a

community service sentence at Nzui dispensary.

I am alive in this regard to the fact that the Appellant has already served 10 months of his sentence, and this Court accordingly orders that that the unexpired term of the Appellant's sentence if any, be commuted to be served by way of community service, and the Appellant shall forthwith be set free unless otherwise lawfully held.

It is so ordered.

**DATED AND SIGNED AT MACHAKOS THIS 29<sup>TH</sup> DAY OF JULY 2015.**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED AT MACHAKOS THIS 30<sup>TH</sup> DAY OF JULY 2015.**

**JUDGE**